Nexstar
BROADCASTING GROUP, INC.

March 10, 2014

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Room TW-A325
Washington, DC 20554

Re: Ex Parte Letter - MB Dockets No. 10-71, 09-182, 07-284, 04-256

Dear Ms. Dortch:

Nexstar Broadcasting, Inc. ("Nexstar") hereby submits this letter to address several recent ex parte submissions in one or more of the above dockets that include inaccurate or misleading information or raise matters which would have been more properly raised during the comment and reply comment periods of the above proceedings in order to allow such comments to be more fully addressed as a part of the record. Specifically, Nexstar addresses matters raised by (i) a Free Press study, *Cease to Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation*, by S. Derek Turner (the "Free Press Study" or "Study");[1] (ii) a letter submitted by several multichannel video programming distributors ("MVPDs");[2] and (iii) an ex parte submission of the United States Department of Justice.[3]

The Free Press Study

The Free Press Study relies on irrelevant facts, misleading or partial citations and, with respect to the operations of Nexstar and its relationship partners,[4] outright false statements to create a picture of local stations languishing away as journalists are fired, local news is eliminated and corporate greed runs rampant in America's newsrooms. Nothing could be further

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1 *See* Letter to Chairman Wheeler from Free Press, MB Docket 09-182 (Dec. 3, 2013) ("Free Press Letter"), which included the Free Press Study.

2 *See* American Cable Association, Charter Communications, DIRETV, DISH Network and Time Warner Cable., Notice of Ex Parte Communication, MB Docket No. 09-182 *et al.* (Feb. 12, 2014) (the "MVPD Letter").

3 *See* Ex Parte Submission of the United States Department of Justice, MB Dockets 09-182, 07-284 and 04-256 (Feb. 20, 2013) (the "DOJ Submission").

4 Most of Nexstar's JSA/SSA relationships, as the Commission is aware, are with Mission Broadcasting, Inc. ("Mission"). As discussed *infra*, Nexstar has an outsourcing agreement for one station WYZZ-TV, Peoria, Illinois, with Cunningham Broadcasting Corporation ("Cunningham").

from the truth. Nexstar and its relationship partners are far from absentee owners who operate to evade the Commission's rules for the sole purpose of maximizing profit at the expense of their stations' local communities.[5]

The Free Press Study contends that consolidation across markets in the television industry is anathema to local broadcast journalism as "absentee corporate owners, concerned only with profit maximization . . . prioritize profit above public service."[6] Nexstar is unsure why the Study vigorously attacks station (and owner) "profitability" when it is that very profitability that ensures that a station can repair or replace broken or outdated equipment, support local community organizations and fund local programming. Nexstar and Mission, for example, have reinvested profits into their facilities, spending millions of dollars to update news production facilities to HD, investing in Doppler weather radar and superior weather services, purchasing live equipment to be able to better report local news events live, and investing in technology to provide improved captioning and better emergency alert systems. A station should not have to operate with negative cash flow to prove that it adequately serves its community.

The underlying theme of the Study appears to be that any consolidation in or across medium and small markets is unacceptable, and that television ownership must stagnantly remain in the hands of single station owners who are unable to leverage multi-station operations to upgrade facilities or negotiate effectively with their large national suppliers. Accordingly, the first part of the Study reviews past and current consolidation providing extensive detail on past and present acquisitions, what drove past and drives present consolidation, which companies own the most stations, which have the greatest percentage of U.S. household reach, the companies' 2012 local advertising revenues, and the stations' network affiliations.[7]

While the "national" data provided in the Study is interesting, it provides not one single fact supporting Free Press's allegation that companies are using "outsourcing agreements to exercise *de facto* control over broadcast TV stations in markets where such acquisitions would not otherwise be permissible under Commission rules."[8] In fact, outsourcing agreements, joint sales agreements (JSAs), shared services agreements (SSAs) and other cooperative agreements

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[5] For specific factual details of the benefits the Nexstar/Mission and Nexstar/Cunningham relationships bring to their local communities, *see* Notice of Ex Parte Communications submitted by Nexstar and Mission, MB Docket 09-182 *et al.* (Feb. 26, 2014).

[6] Free Press Study at p. 2.

[7] Free Press Study pp 9-20.

[8] Free Press Letter at p. 1. Free Press asserts that the burden should be on parties to sharing arrangements to demonstrate that there is no illegal *de facto* control. However, that is not the standard – the standard requires specific allegations of fact that there has been illegal de facto control by a non-licensee party. *See* 47 U.S.C. §309(d)(1) and (2); *Astroline Communications Co. v. FCC*, 957 F.2d 1556 (D.C. Cir. 1998). The Study lacks specific allegations of fact with respect to the Nexstar/Mission relationship, preferring to make inaccurate statements and unsupported inferences. (Nexstar does not undertake to address inaccuracies, if any, with respect to the information provided regarding other broadcasters.)

(collectively "Sharing Agreements") in and of themselves do not confer control over any of a licensee's core obligations – programming, personnel and finance. To the extent Free Press is aware of specific facts and actions of violation by any particular licensee, Free Press should present the Commission with the specific violations, rather than relying on general statements and snippets of filings with other agencies twisted to support its premise that Sharing Arrangements violate the Commission's rules.

In response to the Free PressStudy's factual inaccuracies with respect to Nexstar's Sharing Arrangements, Nexstar provides the following information:

Free Press asserts: "The operating company purchases all the so-called "non-license" assets of a station."[9] ***This is a factually incorrect statement with respect to Nexstar and Mission***. In the vast majority of Mission's station acquisitions, Mission has acquired all of the purchased station assets, from the FCC licenses to physical plant to programming contracts to leases for tower space, and everything else the selling entity owns. The exceptions are those acquisitions pursuant to which Mission has acquired a station that was previously in a JSA/SSA relationship with another party whereby Mission acquired only those assets owned by the prior licensee (for example, WVNY, Burlington, Vermont, which Mission acquired from Lambert Broadcasting).[10]

With respect to the Nexstar/Cunningham relationship,[11] the parties (originally Nexstar and Sinclair) each contributed certain physical plant to their joint operations; however, each party retained sole ownership of its assets. For assets purchased during the existence of the Sharing Arrangement, the agreement specifically provides the manner for distribution of the jointly purchased assets upon any termination of the relationship (and such assets will be distributed back to Cunningham, not Sinclair at any termination).

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9 Free Press Letter at p. 2.

10 In addition, in two current, pending acquisitions whereby Nexstar is purchasing a company's stock and selling certain stations to Mission, in those transactions, Mission is not acquiring any physical plant assets that are not directly related to the FCC licenses (i.e., Mission is acquiring all transmitting equipment, antennas, receivers, satellite equipment and the like as those assets are tied directly to the FCC licenses). Mission is further acquiring all programming contracts, leases, retransmission consent agreements and the like. Conversely, Mission is acquiring 100% of the assets of WICZ and WPBN-LP from Stainless Broadcasting; Nexstar is not acquiring a single asset.

11 Nexstar's outsourcing agreement with station WYZZ-TV was entered into between Nexstar and a subsidiary of Sinclair Broadcast Group (which can hardly be classed as a "shell company") in November 2001. In November 2013, Sinclair sold WYZZ-TV to Cunningham, at which time Cunningham assumed Sinclair's rights and obligations under the agreement. Nexstar has not assumed any additional or new obligations since the ownership change in November 2013. Therefore, Nexstar assumes Cunningham is not a "shell company" either. Nexstar also notes that the Study takes issue with the fact that Nexstar's 10-K filed in March 2013 describes WYZZ as owned by Sinclair (Study at fn, 57). At the time of the filing in March 2013, Sinclair owned WYZZ. Cunningham did not become the owner of WYZZ-TV until November 22, 2013; or more than eight months after Nexstar filed its 2012 10-K report with the Securities and Exchange Commission ("SEC"). Free Press may play fast and loose with facts but Nexstar has a requirement to file its SEC reports in a factually correct manner. Nexstar's recently filed 2013 10-K accurately reflects Cunningham as the current owner of WYZZ-TV.

Free Press asserts: "The operating company controls every aspect of the station just as it would if it were the FCC-recognized license holder. . . . while the license holder has on paper the responsibility for programming that airtime, it appears in practice that performance of this task is often delegated back to the operating company."[12] ***This is a factually incorrect statement with respect to Nexstar and Mission and Nexstar and Cunningham.*** The only programming Nexstar provides to any Mission station or WYZZ-TV (which, consistent with Commission rules, amounts to less than 15% of the station's weekly programming) is local news and/or other local programming mutually agreed upon by the parties (such as local sports, parades, 4th of July broadcasts and the like). Nexstar does not enter into network affiliation agreements or syndicated programming contracts on behalf of either Mission or Cunningham. The applicable station licensee, in all instances, retains control over this core station function.

Free Press asserts that "where the financial terms of these outsourcing arrangements are publicly disclosed, it appears that the operating company receives substantially all of the operated-station's profits, while the license holder is given a nominal management fee."[13] The Free Press Study then wades into Nexstar's and Mission's SEC filings pulling snippets of the reports to bolster its assertion that "Sook set up Mission Broadcasting as a shell company to help Nexstar evade FCC rules and form duopolies in markets that already had very few independent voices."[14]

For example, the Free Press Study references this statement from Nexstar's 2012 10-K filing "we are deemed under U.S. GAAP to have a controlling financial interest in Mission because of (1) the local service agreements Nexstar has with the Mission stations, (2) Nexstar's guarantee of the obligations incurred under Mission's senior secured credit facility, (3) Nexstar having power over significant activities affecting Mission's economic performance, including budgeting for advertising revenue, advertising and hiring and firing of sales force personnel and (4) purchase options granted by Mission that permit Nexstar to acquire the assets and assume the liabilities of each Mission station, subject to FCC consent."[15] From this language, the Study

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12 Free Press Letter at p. 2.

13 *Id.* Free Press Study at p. 34, fn. 73 (comparing the salaries of Nexstar's officers and Mission's officers). Nexstar's board of directors sets Nexstar's top officer's salaries; the Nexstar board has no input into or over any Mission officer salary as established by Mission's directors. As Mission becomes more cash flow positive and profitable, Mission's shareholders, in their discretion, may elect to give themselves increased salaries.

14 Free Press Study at p. 34. The Study quotes an article by Harry A. Jessell for this statement. Nexstar has no control over how other parties characterize or portray their relationship. What matters is that companies that are parties to Sharing Arrangements comply with the Commission's requirements that each operator maintain complete control over its station's programming, personnel and finances, and that each operator have sufficient economic incentive to control the operations of its stations. Nexstar's JSAs, SSAs and option agreements with Mission have routinely been submitted to and approved by the Commission in connection with applications for station acquisitions.

15 *Id.* at, fn 71.

infers that "Nexstar is considered the owner of Mission and all of its assets – including its FCC licenses – under Generally Accepted Accounting Principles and SEC Rules."[16] ***This is a misinterpretation of a very complex area of accounting rules***. SEC rules are for investors and are designed to provide accurate and meaningful information so that "investors" can make proper evaluations and has zero to do with who owns and controls an entity.

GAAP accounting for variable interests and variable interest entities ("VIE") arose in the wake of certain financial reporting scandals (e.g., Enron), when the Financial Accounting Standards Board ("FASB") recognized that financial reporting requirements based strictly on the application of voting control consolidation models did not result in the most meaningful financial presentation. The FASB, therefore, identified an accounting model (the VIE model) to specifically address those instances where another party that has the power to direct an entity's most significant economic activities and the ability to participate in the entity's economics where such party may (based on specific criteria) be required to consolidate the entity into its financial reports. Nexstar does not dispute that its activities under its Sharing Arrangements with Mission give Nexstar the power to direct the most significant economic activities of Mission, i.e., advertising sales. Nor does Nexstar dispute that it participates in Mission's economics through its receipt of sales commission revenues and SSA fees. In addition, according to the guidance, debt guarantees (such as Nexstar's guarantees of Mission's debt and Mission's guarantee of Nexstar's debt) are always variable interests because they absorb risk created and distributed by the legal entity. Based on Nexstar's and its financial auditor's analysis of further complicated guidance issued by the FASB, Nexstar has determined that Mission's financial information is required to be consolidated into Nexstar's SEC filings. Based on that same guidance, Mission's auditors have determined that Mission's guarantee of Nexstar's debt, although a variable interest, does not in itself trigger the requirement that Mission consolidate Nexstar's financial reporting into its filings.

VIE analysis is complicated, and it is understandable that the Study confuses having a reportable financial interest for SEC and GAAP reporting purposes with "ownership." ***However, it is not accurate***. As Nexstar states in the sentences immediately preceding the Study quoted language, "Mission is 100% owned by independent third parties. We do not own Mission or any of its television stations. In compliance with Federal Communications Commission ("FCC") regulations for both us and Mission, Mission maintains complete responsibility for and control over programming, finances, personnel and operations of its stations." Nexstar further highlights Mission's independence in the Risk Factors section of its 10-K, reporting that "Mission may make decisions regarding the operation of its stations that could reduce the amount of cash we receive under our local service agreements" and providing as examples that Mission's programming decisions may prove unpopular and/or may generate less advertising revenue or that Mission's board of directors may choose to pay themselves a dividend.

The incongruity arises because the SEC and FCC are examining different things. For example, the SEC does not care who programs the station, but the FCC considers control over

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[16] *Id.*

programming to be an essential indicia of station ownership. Conversely, the SEC is focused on ensuring those who invest in public companies have complete and accurate financial information regarding the risks associated with an investment, something entirely irrelevant to FCC ownership analysis.

The Study further asserts that "Mission sends all of its revenues to Nexstar, and Nexstar covers any losses."[17] ***This also is a factually incorrect statement.*** In support of Nexstar covering Mission's losses, the Study relies on the fact that Nexstar indemnifies Mission for *Nexstar's* activities under the SSA/JSAs. Indemnification of the other party for one's actions under a contract is standard contract language and in no way implies that the indemnifying party (Nexstar) covers the indemnified party's (Mission) for losses caused by the indemnified party's (Mission's) own actions or operations. The fact that Nexstar indemnifies Mission for Nexstar's actions in no way means that Nexstar makes payments under any Mission agreement or contract if Mission is unable to make such payments itself. Nor do the payments due and payable to Nexstar from Mission under SSA/JSAs get reduced to offset Mission operating losses.

With respect to the Study's contention that "Nexstar has received substantially all of [Mission's] available cash, after satisfaction of operating costs and debt obligations. We expect that Nexstar will continue to receive substantially all of our available cash, after satisfaction of operating costs and debt obligations" equates to Mission sending all of its revenues to Nexstar, ***the Study makes a fundamentally incorrect assumption in equating "available cash" to revenues***. A review of Mission's financial statement (found at page F-4 of Mission's 10-K report for the period ended December 31, 2012) is all that is necessary to correct this mistake. Mission's net revenues for the year ended December 31, 2012 totaled \$51,962,000. Of this revenue, \$33,352,000 was Mission's seventy percent of the revenues related to Nexstar's sale of Mission's advertising time (i.e., Nexstar's thirty percent commission is deducted prior to payment of the revenues to Mission). Mission's total operating expenses for the period were \$29,965,000 of which only \$7,740,000 was paid to Nexstar for the services provided under the SSA.[18] That is, Mission's payments to Nexstar under the SSAs for the services provided to 19 stations was only 15% of Mission's total revenues, ***not all of Mission's total revenues***.[19]

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17 *Id.* at fn 72, quoting from Mission's 2012 10-K SEC report.

18 In 2012, Nexstar provided approximately 130-140 hours of news per week to Mission or roughly 6800 hours for the year. Based on the total SSA fees, Mission paid approximately \$1150 per hour for such news if the entirety of the SSA fees are allocated solely to news production – and paid nothing for engineering, master control, traffic, promotional production, payables processing, security, janitorial or any other service provided by Nexstar under the SSA, a bargain by any metric. The SSA fees are "low" for the services provided because the JSA commissions offset a portion of the fees Nexstar incurs to provide the services to Mission. If JSAs are deemed attributable interests, the Mission's SSA fees will correspondingly rise to compensate for the decrease in commissions.

19 In fact, Mission's net income in 2012 was positive by \$6,727,000 (before taxes), all of which was retained by Mission. Nor did Nexstar have any input into what Mission has done with that profit. In 2010 and 2011, Mission had net losses. Although Mission has not yet filed its 2013 10-K report, Mission will report a net loss of more than \$6,000,000 before taxes, notwithstanding the fact that Mission's revenues increased by nearly \$16 million while fees paid to Nexstar under the SSA increased by only \$2 million (due to the additional of three stations under Sharing Arrangements in 2013) because of increases across all of Mission's operating expenses.

Equally important, the key provisions of the Nexstar/Mission Sharing Arrangements are derived from the many Commission and Media Bureau decisions examining and approving these types of relationships and each has been fully reviewed by the Commission prior to implementation. Further, in 2003, the Commission was required by the SEC to assess and evaluate the Nexstar/Mission SSA-JSA structure for compliance with the Commission's rules in order for Nexstar to obtain SEC approval for its initial public offering. There has been no change (except as required by the Commission) in the Nexstar/Mission governing documents from those approved in 2003 as Nexstar and Mission have entered Sharing Arrangements in other markets.[20]

The Study criticizes the lack of news on Nexstar's and Mission's stations in the Billings, Montana market stating that "when Nexstar acquired the local Fox and ABC affiliates in 2003, it promptly shut down both stations' news operations."[21] First, this is a grandfathered time brokerage agreement, not a SSA/JSA relationship. Second, Nexstar did not own KSVI or program KHMT in September 2003; the prior owner/programmer is the entity that terminated the local news on both stations. Third, the Billings market is home to two very dominant stations that collectively earn more than 80% of the market's limited revenues leaving the remaining less than $3 million in market to be earned by KSVI and KHMT. Even on a combined basis, the stations' revenues do not support reintroducing local news on either station. And finally, this is the single and only market where the contractual relationships between Mission and Nexstar have not resulted in sustained or increased local news on one or both stations. Moreover, Nexstar's commitment to local content for its and Mission's stations is highlighted by its recent addition of a second Director of Local Content to join the company.[22]

Finally, the Study claims "closing newsrooms is a part of Nexstar's business strategy," claiming that Little Rock is an "egregious example" of this strategy with Nexstar firing 30 employees, including longtime journalists on the Mission station.[23] In support of the foregoing, the Study cites to a news article titled "Almost 30 Lose Jobs at KARK, KLRT as TV Owners Consolidate," which reports that of the almost thirty employees let go as a part of the consolidation, four were on-air employees and only one was employed by KLRT (Mission).[24]

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[20] Although Free Press and others may not like sharing arrangements, their characterization of these types of arrangements, in and of themselves, as blatant violations, "skirting of the rules," and illegal or covert consolidation conflicts with the Commission's own determination as confirmed to another regulatory agency.

[21] Free Press Study at p. 35.

[22] *See* Nexstar Broadcasting Names Christopher Berg Director of Local Content Development – West, rel. Feb. 28, 2014 (http://www.nexstar.tv/story/d/story/nexstar-broadcasting-names-christopher-berg-direct/42223/kujV4HmNGkOagpb4N93yHg).

[23] Free Press Study at p. 35.

[24] In fact, although one anchor/reporter, two reporters and one sports anchor were a part of the reduction in force, the sports anchor was in fact replaced with a sports reporter, resulting in the loss of only 3 reporters (or 10% of the total employees terminated via the reduction in force).

Contrary to the Study's assertion, the KLRT newsroom is not closed and in fact KLRT broadcasts more news in 2014 than was broadcast on the station prior to the SSA/JSA relationship going into effect. The Study yet again ignores facts in favor of distorting the truth. Nexstar further affirms that it has not "closed" a single newsroom upon the implementation of a SSA/JSA relationship.

The Free Press Study places no relevant factual information into the record and merely presses its policy agenda to eliminate legal, market-beneficial operations in pursuit of its "ideal" and unsustainable view of how it believes the media market should operate. As such, the Commission should not rely on this study for definitive support that all Sharing Arrangements are and must be deemed attributable interests under the Commission's rules. Indeed, the Commission should support strong broadcast companies that actively engage in their communities whether through increased local news, expanded community involvement or both.

The MVPD Letter

From the moment that television broadcast stations began to assert their rights to retransmission consent revenues MVPDs have been proclaiming the unfairness of it all – that somehow they (Time Warner, DirecTV, DISH, Charter), the largest MVPDs in the country, are disadvantaged in negotiations – and as a result consumers are harmed by rising prices and a potential for loss of multiple big 4 affiliates.[25] In filing after filing submitted to the Commission MVPDs allege that it is joint negotiations for big-4 affiliated stations that are "inevitably lead[ing] to higher rates for MVPDs and their subscribers."[26] In support of this allegation, MVPDs submit "studies" prepared by individuals engaged by them to examine the question.

Nexstar does not dispute that, in 2005, when it first initiated its push for retransmission consent payments (seeking a penny a day from MVPDs, which it generally did not get), there were some blackouts as MVPDs fought to remain free of retransmission consent payments. However, since that time – notwithstanding joint negotiations with Mission – there has not been a single failure by the parties to reach agreement without removing stations from the MVPD systems. Moreover, not a single MVPD, including DirecTV, DISH, Time Warner or Charter, has ever objected to negotiations for an agreement that covers both Nexstar's and Mission's stations or even asked to negotiate separately with Mission.

Nexstar also does not dispute that between 2006, when it received its first retransmission consent payments from cable operators, and the present, those fees have increased by "high"

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25 A potential for loss is not in fact a loss. Nexstar is unaware of any independent study examining all retransmission consent disputes with retransmission outages to establish the fact that these outages occur only in or more frequently in markets where on station is acting as agent for another in-market station. If the Commission were to conduct such a study, Nexstar is fairly certain that most retransmission outages in the past five years have not involved broadcaster joint negotiations. Nexstar is equally certain that the Commission would see a pattern emerge with respect to the MVPDs who are involved in such blackouts.

26 MVPD Letter at p. 7.

percentages.[27] However, when one starts from a minuscule figure or zero, every increase is significant. For example, an increase from \$0.10 to \$0.30 is a 200% increase. In addition, rising MVPD costs cannot be examined in a vacuum focused solely on broadcast channels. For example, in 2013, DirecTV, Cablevision and Verizon increased subscriber bills by \$2-\$3 per month to pay for sports programming.[28] ESPN costs \$5.54 per subscriber according to SNL Kagan and every subscriber is paying that fee regardless of whether they watch that channel or not. TNT gets \$1.33 per subscriber. Even Fox News gets \$0.94 per subscriber.[29] Yet somehow, television broadcasters seeking a similar \$1 fee are allegedly the reason MVPD bills have skyrocketed. In reality, broadcast channels make the most convenient target for MVPDs to attack because they are the most watched and demanded, and the channels for which subscribers will switch MVPDs; they also make the most convenient targets because the Commission regulates television broadcasters, while it does not regulate ESPN, TNT and Fox News.[30]

It is particularly laughable that Time Warner Cable, one of the largest MVPDs, which also negotiates on behalf of group MVPD operator Brighthouse Networks, is claiming it is unfairly disadvantaged in negotiations with any television broadcaster. Nonetheless, Time Warner vehemently objects to Nexstar acting as negotiating agent for Mission. American Cable Association ("ACA") likewise vehemently objects to Nexstar acting as negotiating agent for Mission, while its members in the Rockford and Green Bay markets engage a single "consultant" to handle their negotiations and others of its members engage the same law firm whose attorneys freely exchange information, including pricing information, amongst themselves to essentially engage in joint negotiations.[31]

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[27] Chairman Wheeler, for example, notes that retransmission consent fees have increased by 8,600 percent in seven years with retransmission revenue fees of nearly \$2.4 billion dollars in 2012. 8,600 percent seems excessive, but in reality this translates to MVPDs paying about \$0.50 cents a month or \$6.00 per year for a single television station – or essentially a month and a half of ESPN payments or half of the MVPD's payments for TNT or Fox News. (Nielsen reported that there were 114,639,310 television households in 2012; the generally accepted belief is that 85% of those households subscribe to an MVPD, or approximately 97,450,000 households subscribed to MVPD services in 2012. This results in each MVPD household paying approximately \$24.60 per year or \$2.05 per month to receive all of their in-market local television stations. Assuming there are 4 stations in any market that results in retransmission consent fees of \$0.50 per station or \$6.00 per year.)

[28] *That new \$2, \$3 fee on cable bill? Sports the culprit*, Michael Hiestand, USA TODAY Sports, Feb. 28, 2013, http://www.usatoday.com/story/sports/columnist/hiestand-biz/2013/02/28/espn-cable-tv-regional-sports-networks-verizon-fox/1947197/.

[29] *The Most (And Least) Expensive Basic Cable Channels, In 1 Graph*, Quoctrung Bui, Sept. 27, 2013, http://www.npr.org/blogs/money/2013/09/27/226499294/the-most-and-least-expensive-cable-channels-in-1-graph.

[30] Perhaps that is why MVPDs have now started demanding that the Commission legislate that a station not be allowed to multicast two big-4 networks, thus seeking Commission rules to interfere with a station's right to enter into affiliation agreements with any programmer it chooses (and ostensibly deprive subscribers of access to a big-4 network available only by multicasting). MVPD Letter at p. 11.

[31] Ironically, at the same time ACA is pushing the Commission to prevent joint broadcast negotiations it is simultaneously asking the Commission to expand the definition of buying groups for its purposes. *See ACA Pushes FCC To Give NCTC Real Program Access Muscle*, John Eggerton, Feb. 26, 2014 (http://www.broadcastingcable.com/news/washington/aca-pushes-fcc-give-nctc-real-program-access-

The MVPDs assert that the record is devoid of evidence of that joint negotiations yield any cognizable efficiencies.[32] When Nexstar acts as agent for Mission, the costs to Mission for negotiating with MVPDs are borne by Nexstar as a part of the SSA fees. To the extent the Commission moves to prohibit Nexstar from acting as agent on Mission's behalf, the currently uncognizable efficiencies will be readily apparent to the MVPDs, as Mission will need to engage appropriate personnel to undertake its negotiations on a separate basis. Those fees will be passed on to the MVPDs in the form of higher per subscriber rates charged to the MVPDs.[33] The MVPDs will also have to engage in more than double the number of negotiations themselves, resulting in more time devoted to the process by said MVPDs, and thereby less efficient.

Nexstar urges the Commission to independently determine how many retransmission consent related blackouts actually involved joint negotiations by broadcasters, whether the complaining MVPDs actually have ever asked for the opportunity to negotiate separately and conversely whether they have ever requested to negotiate jointly, and to examine broadcaster rates within the context of the audiences delivered by broadcasters versus the rates paid for the audiences delivered for non-broadcast programming. Nexstar believes that a truly independent review will demonstrate both that (i) the fees paid for broadcast channels are a comparative bargain and (ii) MVPD complaints of "extreme" percentage increases do not bear out when considered in relation to the fact that such fees started at zero less than a decade ago. Nexstar believes that independent factual evidence will confirm that broadcast retransmission consent fees are not excessive, that joint negotiations have not been the underlying cause of subscriber blackouts, and that those arguing loudest for such change have never actually asked broadcasters for it.

Department of Justice Submission

On February 20, 2014, nearly two years after the comment period in the 2010 Quadrennial Review proceeding closed, the Department of Justice ("DOJ") submitted an ex parte filing concluding that based on the DOJ's recent experience, attribution of television JSAs (or any agreement that confers control over pricing and sales) is appropriate for the reasons it expressed in support of radio JSA attribution in 1997.[34] DOJ recommends this action based on its 1997 view of the advertising product market as limited to television broadcasting spot

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muscle/129424). Equally ironic, ACA makes the same arguments regarding small and medium-sized MVPDs that broadcasters have been making about small and medium sized market broadcasters for years – i.e., that the Commission is leaving them waiting for the same regulatory relief already granted to larger MVPDs (and markets).

[32] Id. at p. 8.

[33] Although Nexstar cannot speak for Mission, Nexstar anticipates that Mission's retransmission consent fees will actually be higher than Nexstar's in order to offset the expenses it will incur as a result of having to pay for separate negotiators.

[34] DOJ Submission at p. 16.

advertising because "advertisers view spot advertising on broadcast television stations as sufficiently distinct from advertising on other media (such as radio and newspaper)."[35]

With all due respect to the DOJ, the advertising market has changed significantly in the 17 years since 1997. DOJ does not acknowledge that the market is comprised of more than radio, television and newspaper, ignoring entirely cable interconnects (joint sales arrangements among in-market cable companies, which did not exist in 1997), online advertising (which did not exist in any meaningful way in 1997), mobile advertising (which did not exist in 1997), satellite radio (which did not exist in any meaningful way in 1997), digital billboards (which did not exist in 1997) and a plethora of other competing platforms.[36] DOJ also ignores the significant and disruptive impact that time-shifted viewing through DVRs and similar devices is and will continue to have on television advertising. For the DOJ Submission to be of any relevance, DOJ must update its nearly 20 year out-of-date views to account for current market realities.

Nexstar further notes that the DOJ affirmed that "a series of agreements between two broadcast stations . . . does not mean the agreements necessarily violate the antitrust laws" and "some [JSAs] may not harm competition.[37] The DOJ highlights that *it* reviews such transactions on a case-by-case basis, rather than a simple blanket rejection of such transactions, as it is urging the Commission to adopt. In fact, DOJ goes further to acknowledge that more significant integration between stations (such as through Sharing Arrangements) may be more acceptable than a JSA standing alone.[38] Moreover, the blanket ban that the DOJ is urging the Commission to adopt is wholly inconsistent with its position in finding several recent transactions that include various Sharing Arrangements to be consistent and permissible within the antitrust laws.[39] As the expert agency best able to review Sharing Arrangements for compliance with antitrust law

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[35] *Id.* at p. 8. Contrary to DOJ's perception, advertisers no longer view any advertising market as "distinct," rather advertisers view that advertising which will provide the most cost effective reach for the target audience they are seeking to reach as the most effective. Moreover, advertisers actually appreciate being able to negotiate their television advertising buys with single companies, a fact which DOJ would discover in speaking to advertisers in markets where JSAs currently exist.

[36] DOJ's myopic and outdated view of product markets ignores that within the next 2-3 years, local online digital advertising is predicted to exceed all local offline advertising collectively (i.e. online advertising revenues will exceed the combined advertising revenues of television, radio and newspaper together in just a few short years). *The Future of Legacy Media, With 5 Years of Digital Disruption Ahead, What Happens Next*, Borrell Associates Management, Kip Cassino, Principal Author, Jan. 2014, at Figure 8.3. The Commission's assumption that JSAs result in advertisers paying higher fees is equally myopic, a fact the Commission could easily determine if it bothered to ask the question.

[37] DOJ Submission at p. 12.

[38] *Id.* at fn. 21.

[39] *See e.g.*, Gannett-Belo (DOJ approving Sharing Arrangements in two markets), BTCCDT-20130619AAY *et seq.*; Media General-New Young Broadcasting, BTCCDT-20130703ABQ *et al.*; and Sinclair-Barrington, BALCDT-20130315ACB *et al.*

the DOJ should not be urging the Commission to adopt a flat ban on such arrangements; and the Commission should not be adopting regulations that are squarely at odds with how the DOJ treats transactions that include these agreements.

Finally, DOJ's (and the Commission's) reliance on the Commission's 2003 decision to make radio JSAs attributable as proof that television JSAs should be attributable as well ignores the very fundamental differences between radio and television. The Commission's radio ownership rules allow ownership of at least four and as many as eight stations in a market whereas they restrict television station ownership to single station in the vast majority of markets. The television JSA attribution that the Commission is undertaking would occur in a vacuum, unaccompanied by the significant relaxation of ownership limits that had been adopted in radio. In addition, under radio JSAs in effect at the time the Commission deemed them attributable interests, the broker retained all of the brokered station's revenues and paid the licensee a flat fee that remained the same regardless of what the brokered station revenues were. In contrast, television JSAs pay a percentage of the revenues (generally 70%) earned back to the brokered station licensee. This fundamental difference gives the brokered station licensee significant incentive to provide the best and most attractive programming on the station in order to increase its revenues earned.

Conclusion

Nexstar and its sharing partners have not entered into their SSA/JSA relationships to patently circumvent the Commission's ownership rules. It is a fact that television remains a primary source for local news, it is a fact that producing local news is a million dollar (or much more) year investment and it is equally a fact that there is ever growing competition for the advertising dollars that support local news – from a myriad of sources, including cable interconnects, social media, Google, radio, outdoor, newspapers, targeted digital advertising, and mobile among many. Sharing Arrangements are a reflection of the need for medium and small market broadcasters to operate as efficiently and effectively as possible in order to preserve local news in their markets as well as super-serve the stations' local communities. The record is replete with the benefits these relationships have brought to numerous communities around the country. Many of these benefits may not be sustainable if the Commission requires termination of these types of arrangements. The Commission should not rush to eliminate these beneficial relationships in a vacuum based on inaccurate, misleading and generalized innuendo; rather, the Commission should address modifications, if any, to these relationships within a broader review of the impact the existing, and ever more competitive media marketplace is having on stations operating under a decades- old regulation that prohibits ownership of more than one television station in the vast majority of medium and small markets. As Chairman Wheeler himself has noted, it is time for the Commission to deal in facts, not in self-serving, unproven speculation and innuendo.

Respectfully submitted,

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